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No. 10-951

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IN THE

Supreme Court of the United States

REEL HOOKER SPORTFISHING, INC., EXACT GAME FISHING, INC., FINEST KIND, INC., PETITIONERS

v.

STATE OF HAWAI'I, DEPARTMENT OF TAXATION

PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF HAWAI'I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 445 of the Omnibus Maritime and Coast Guard Improvements Act of 2002, 33 U.S.C. § 5(b), provides that "[n]o taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest" if the vessel operates on navigable waters.

The question presented is whether, in exempting certain vessels and the passengers they carry from local taxation, § 5(b) precludes taxation of the operator of a tax exempt vessel on the basis of the gross fares paid by tax exempt passengers.

RULE 29.6

Petitioners are Reel Hooker Sportfishing, Inc., Exact Game Fishing, Inc., and Finest Kind, Inc.; each is a corporation organized under the laws of the State of Hawai`i.

Petitioners' capital stock is owned by David Hudson; none of the corporations has a parent or publicly held company owning 10% or more of Petitioners' stock.

Respondents are the Hawai`i Department of Taxation and its director, Kurt Kawafuchi.

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Reel Hooker Sportfishing, Inc., Exact Game Fishing, Inc. and Finest Kind, Inc. (collectively, "Petitioners") petition for a writ of certiorari to review the opinion and judgment of the Intermediate Court of Appeals of the State of Hawai`i (the "ICA").

The ICA erred in construing federal law as allowing the state to base Petitioners' liability for general excise taxes on the gross earnings of their tax exempt vessels where the sole source of those earnings are fares paid by passengers who themselves are exempt from local taxation.

OPINIONS BELOW

The opinion of the ICA is reported at 123 Hawai`i 494 and 236 P.3d 1230 (Haw. App. 2010), and is in the Appendix at 5a (hereinafter "A._a"). The ICA entered judgment on appeal on August 31, 2010, affirming the consolidated judgment of the Tax Appeal Court entered December 22, 2008. A.21a. While acknowledging vessel passengers bore the financial impact of the levy, the ICA concluded federal law did not preclude Hawai`i from measuring Petitioners' liability for GET on the basis of the gross fares paid by their otherwise tax exempt customers. A.14a.

On October 19, 2010, the Hawai`i Supreme Court declined review of the opinion and ensuing judgment. A.1a-2a.

JURISDICTION

The Hawai`i Supreme Court rejected Petitioners' application for certiorari on October 19, 2010. A.1a-2a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

U. S. Const., art. VI, cl. 2, provides in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

33 U.S.C. § 5(b), as adopted in 2002, provided:

> *No taxes*, tolls, operating charges, fees, *or any other impositions whatever* shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for

(1) fees charged under of this title;
(2) reasonable fees charged on a fair and equitable basis that--
(A) are used solely to pay the cost of a service to the vessel or water craft;
(B) enhance the safety and efficiency of interstate and foreign commerce; and
(C) do not impose more than a small burden on interstate or foreign commerce.

A.57a-58a (Emphasis supplied).

Section 5(b) was amended in 2003 to allow "property taxes on vessels or watercraft . . . if those taxes are permissible under the United States Constitution."

A.62a; *See* 33 USC § 5(b)(3).

33 U.S.C. § 2236 provides in relevant part:

(a) Consent of Congress
Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel . . .

(1) Purposes

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a

usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

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(4) Formulation of port or harbor dues

Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non-Federal interest shall consider--

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

(D) any other pertinent factors.

***

(b) Jurisdiction

(1) The district court of the United States for the district in which is located a non-Federal interest that levies port or harbor dues under this section has original and exclusive jurisdiction over any matter arising out of or concerning, the imposition, computation, collection, and enforcement of port or harbor dues by a non-Federal interest under this section.

(2) Any person who suffers legal wrong or is adversely affected or aggrieved by the imposition by a non-Federal interest of a proposed scheme or schedule of port or harbor dues under this section may, not later than 180 days after the date of hearing under subsection (a)(5)(A)(iii) of this section, commence an action to seek judicial review of that proposed scheme or schedule in the appropriate district court under paragraph (1).

(3) On petition of the Attorney General or any other party, that district court may--

(A) grant appropriate injunctive relief to restrain an action by that non-Federal interest violating the conditions of consent in subsection (a) of this section;

(B) order the refund of any port or harbor dues not lawfully collected; and

(C) grant other appropriate relief or remedy.

Haw.Rev.Stat. § 237-13(6)(A) provides in relevant part:

> Upon every person engaging or continuing within the State in any service business or calling . . ., there is likewise hereby levied and shall be assessed and collected a tax equal to four per cent of the gross income of the business . . . .
>
> Haw.Rev.Stat. defines "Service business or calling" to include "all activities engaged in for other persons for a consideration which involve the rendering of a service, including professional and *transportation services* . . . ." (Emphasis supplied).

Haw.Rev.Stat. § 237-41.5 provides in relevant part:

> (a) There shall be personal liability for the [general excise] taxes imposed under this chapter as provided in this section for the following amounts of gross income or gross proceeds:
>
> (1) Any amount collected as a recovery of the taxpayer's liability under this chapter, where the amount is passed on as the tax owed by the taxpayer under this chapter for the transaction and is separately stated or accounted for in a

receipt, contract, invoice, billing, or other evidence of the business activity; or

(2) An amount equal to the tax liability under this chapter on a transaction where a taxpayer does not separately state or account for the amount as a tax recovery as provided in paragraph (1). For purposes of this paragraph, the amount of the imputed tax liability is the result of multiplying the gross income or gross proceeds received in the transaction by the tax rate.

The amounts under paragraphs (1) and (2) shall be held in trust for the benefit of the State and for payment to the State in the manner and at the time required by this chapter.

STATEMENT

1. Nature of the Case.

Petitioners began their challenge of the assessment of General Excise Taxes ("GET") on the charter earnings of their vessels through separate complaints filed in the state Tax Appeal Court. A.7a. Eventually consolidated the complaints sought a declaration that § 5(b) preempted the assessments and a refund of GET paid under protest. A.8a.

The Tax Appeal Court heard the parties' cross-motions for summary judgment on November 3, 2008. A.34a. On December 22, 2008, the court entered orders granting Respondents summary judgment and denying

Petitioners' opposing motions. A consolidated judgment dismissing all claims was entered that day. A.22a.

Following timely appeal, the ICA ruled that § 5(b) "does not preempt the assessment of Hawai`i GET on the charter fishing revenue of these Hawai`i businesses because GET is a tax assessed on gross business receipts for the privilege of doing business in Hawai`i and is not a tax on their vessels or passengers." A.6a-7a.

2. Exemption of Vessels Operating on Navigable Waters and Their Passengers.

Section 445 codified the limits on the power of local authorities to tax vessels operating on navigable waters and their passengers. A.55a. The underlying problem was characterized as involving "local jurisdictions seeking to impose taxes or fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes and fees on vessels even where the vessel is not calling on, or landing, in the community." A.54a. The response, however, was a broad general ban on "taxes, tolls, operating charges, fees or any other impositions whatever." A.57a. The only exceptions were for assessments relating to harbor improvements under the Water Resources Development Act of 1998[1], or the "extremely limited

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[1] In 33 U.S.C. § 2236 Congress consents to port or harbor dues in the form of tonnage duties or fees on certain vessels engaged in

circumstances in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel." A.54a. "Generally, taxes will not be allowed under this section." *Id.*

Congress did not write on a blank slate in clarifying the sole circumstances under which certain vessels, their crew and passengers could be taxed. Section 445 mirrors, as one example, this Court's early decision extending to corporate owners the benefit of Commerce Clause limits on the power of states to tax vessels; namely, "exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for [their] use, or as ordinary taxes upon the value of the property." *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203-204, 835 (1885). Among the decisions canvassed by the Court is *Henderson v. Mayor of New York*, 92 U.S. 259 (1875) which invalidated taxation of the dividends of ferry operator. Dispositive of the issue was the ultimate effect of the tax on passenger and vessel:

> In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger

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trade entering or departing from a harbor levied in conjunction with certain harbor improvements. Fees must be levied on a "fair and equitable basis." Any person who suffers legal wrong or is adversely affected or aggrieved by their imposition may seek judicial review in federal court and a refund.

> brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

92 U.S. at 268.

Gloucester Ferry also reiterated that the power to regulate commerce "embraces within its control all the instrumentalities by which it may be aided and conducted; to determine when it shall be free, 'and when it is subject to duties or other exactions.'"

> The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until congress intervenes and assumes control of them.

114 U.S. at 832. Section 445 is a prime example of the exercise of the paramount authority of Congress over vessels engaged in commerce on navigable waters.

Section 445's express exceptions also reflect Tonnage Clause jurisprudence. The clause reads: "No state shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art I, sec. 10, cl.3. It "embrac[es] all taxes and duties regardless of their name or form, even though not measured by the tonnage of a vessel, which operate to impose a charge

for the privilege of entering, trading in or lying in a port.'" *Polar Star, Inc. v. City of Valdez*, __ U.S. __, 129 S.Ct. 2277, 2283 (2009), citing *Clyde Mallory Lines v Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-266, 56 S.Ct. 194(1935). The clause protects vessel and owner alike. *Polar Star, Inc.*, 129 S.Ct. at 2283. But states are allowed, as *Clyde Mallory Lines* shows, to recover from vessel operators a reasonable charge reflecting the cost of facilities and services available to visiting vessels. Section 445 expressly preserves if not sharpens this long established exception to the Tonnage Clause.

Section 445 failed, however, to preserve another important exception to the limits on state power to tax vessels - - when they are taxed as property:

> . . . a nondomicilliary jurisdiction may constitutionally tax property when that property has a 'substantial nexus' with that jurisdiction, and such a nexus is established when the taxpayer 'avails itself of the substantial privilege of carrying on business' in that jurisdiction.

Polar Star, Inc., 129 S.Ct. at 2284, *citing Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434,441-445, 99 S.Ct. 1813 (1979). The omission was apparent by the next session of Congress. A.59a. The conference committee headed by Mr. Young recommended amendment to reinstate the power to levy property taxes. A.60a. The amendment was retroactive to November 25, 2002, "[t]o assure the consistent application of legal principles concerning non-Federal taxation of interstate transportation equipment." *Id.*

In the conference committee report submitted on October 29, 2003, Mr. Young observed:

> The legislation [the Vision 100 Century of Aviation Reauthorization Act] includes a section that amends section 4(b) of the Rivers and Harbors Appropriations Act of 1884 to clarify that the restriction in that section with respect to taxes on vessels or other water craft does not apply to property taxes on vessels or water craft . . . so long as those taxes are constitutionally permissible under long-standing judicial interpretations of the Commerce Clause.

Id. The report then cites prior decisions of this Court, including *Japan Line*, sustaining taxation of vessels as property so long as it is "fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the taxing entity." *Id.* "Clarification" was thus necessary to reinstate the property tax exception swept away by section 445.[2]

The committee report then notes ambiguously that "section 4(b) does not affect whether sales or income taxes are applicable with respect to vessels." *Id.* The commentary concludes: "The purpose of section 4(b) was to clarify existing law with respect to

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[2] This Court appears divided whether a duty of tonnage could pass muster under the Tonnage Clause if it takes the form of a property tax. *See Polar Star, Inc.*, 129 S.Ct. at 2288 (opinion of ROBERTS CJ, concurring in part) ("I do not see how an unconstitutional tax on maritime commerce becomes permissible when bundled with taxes on other activities or property."). In any event Congress in enacting section 445 provides the requisite consent.

trade. *Id.* The license affords unrestricted access to the navigable waters surrounding Maui, Lanai and Molokai. *Id.*[4]

Petitioners charter their vessels to individuals wishing to fish those waters for pelagic game fish such as marlin and dolphin fish (mahimahi). A.7a. Charter fishing is among the activities that define a "commercial vessel." H. Admin. R. § 13-231-54. Operation of such vessels in Hawai`i requires a commercial use permit issued by the state Department of Land and Natural Resources. *Id.* The permits are conditioned on a use fee that is based, as in the case of GET, on a percentage of the operator's "gross receipts." Haw.Rev.Stat. § 200-10(c)(4).[5]

Fares paid by passengers are the principal source of Taxpayers' earnings. A.7a. Since beginning operations decades ago, Taxpayers have added GET to the charter fares collected from their passengers, a

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[4] *Young v. Coloma-Agaran*, 340 F.3d 1053, 1055 (9th Cir. 2003) (federal coasting license entitles vessels to engage in coastwise trade on Hanalei Bay, Kauai, including transportation of passengers).

[5] The commercial use fee attaches to "all moneys paid or payable to the account of the vessel owner, for the rendition of services, or resulting from trade, business, commerce, or sales by the vessel owner when the services, trade, business, commerce, and sales have a direct relationship to the vessel." H. Admin. R. § 13-231-56. The commercial use fee increased in 2005 from two to three percent of the permit holder's gross receipts. Haw.Rev.Stat. § 200-10(c)(4).

practice that is industry wide. *Id.*[6] At the heart of this controversy is the assessment of GET on Petitioners' gross income from their charter fishing business. A10a-11a.

Proceedings in the Intermediate Court of Appeals.

The court below concluded the exemption of Petitioners' vessels, their crews, and passengers did not prevent local taxation of passenger fares so long as the levy was on the vessel operator: "The federal statute refers only to *vessels* and their *passengers and crews*, and simply does not address the business revenue or gross income generated by a business that operates the vessel." A.12a. The panel distinguished this Court's decision in *Aloha Airlines v. Dir. of Taxation of Hawai`i*, 464 U.S. 7, 104 S.Ct. 291 (1983), because the Airport Development Acceleration Act of 1973 ("ADAA") prohibited state taxation of airline passengers or "'the sale of air transportation or *on the gross receipts derived therefrom*.'" *Id.*[7] Section 5(b) does not refer to a vessel's gross receipts, thus the ICA saw no basis for express preemption: "Particularly in light of the strong presumption against preemption, we decline to broadly construe the term 'vessel' to include

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[6] The practice is not confined to the boating industry. Hawai'i businesses are allowed by law to pass on their general excise tax costs to customers as a "cost recovery." *See* e.g. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049 (1984) (upholding standing of taxpayer-wholesalers of alcoholic beverages who passed discriminatory excise tax on to their customers).

[7] The absence of the italicized phrase is inconsequential. The ADAA did not ban taxation of the instrumentality itself, as does § 5(b).

the gross income generated by a taxpayer's use of its vessel." A.13a.

The indirect effect of the assessment on exempt passengers was dismissed. The court acknowledged Petitioners treat GET "as a pass-through charge to their customers/passengers," yet this fact "does not change the nature of the GET from a tax on their businesses to a tax on their customers." A.14a.

Lastly, the court below rejected Petitioners' claim of implied preemption. A.17a. First, the panel saw no conflict with federal law because state law did not require charter boat operators to pass through GET to their passengers. A.14a. It also disagreed that the assessments at issue pose an obstacle to federal regulation of the nation's waterways. A.17a. As to field preemption, the ICA concluded: "While we recognize the broad scope of federal maritime legislation, we fail to see how the imposition of GET on the gross receipts of Taxpayers' charter fishing businesses interferes in any way with the uniform federal regulation of maritime commerce." A.16a-17a.

REASONS FOR GRANTING THE PETITION

1. The Lower Court's Approach to the Preemptive Scope of § 5(b) Conflicts With Relevant Decisions of This Court.

The court of appeals labored under the mistaken view that in determining the preemptive scope of § 5(b) it should, as a general rule, "accept the reading that disfavors preemption." A.9a, *citing Bates v. Dow*

Agrosciences LLC, 544 U.S. 431, 449 (2005). Thus, the "considerable" burden was placed on Petitioners "'. . . to overcome the ["strong"] starting presumption that Congress does not intend to supplant state law.'" A.10a, quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). This is no longer the approach, however, where Congress has expressly pre-empted state law. *Riegel v. Medtronic, Inc.*, 552 U.S. ___, ___, 128 S.Ct. 999, 1003 (2008) (construing the express pre-emption provision of the Medical Device Amendments of 1976 without reference to the presumption against pre-emption); *Altria Group, Inc. v. Good*, 555 U.S. ___, ___, 129 S.Ct. 538, 558 (2008) (THOMAS, J., dissenting opinion) ("In light if *Riegel*, there is no authority for invoking the presumption against pre-emption in express pre-emption cases."). Given the unequivocal wording of § 5(b), analysis of its pre-emptive scope does not begin with artificial presumption.

The lower court's heavy reliance on the presumption in deciding the scope of express pre-emption under § 5(b) was misplaced for a second reason. The presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence[,]" such as maritime commerce. *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135 (2000). The Supreme Court long ago recognized the paramount authority of Congress to regulate maritime commerce. It is "the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203-204 (1885) (emphasis

added); *accord Kaiser Aetna v. United States*, 444 U.S. 164 (1979).[8] When Congress exercises that authority, as it did in adopting § 5(b), there is no role for the presumption against pre-emption. *Locke*, 529 U.S. at 108: ". . . in this area [national maritime commerce] there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police power." In view of the express exemption of Petitioners' vessels and their passengers from local taxation, it was wrong to presume that Congress intended such taxes could be collected by assessing owner-operators of those vessels on the basis of the gross amount of passenger fares.[9]

2. The Question Presented is Important and Will Likely Arise Again.

Petitioners are representative of the hundreds of commercial vessels that operate across the Hawaiian islands. Upwards of one hundred such vessels carrying up to 149 passengers operate from Maui's principal small boat harbors at Lahaina and Maalaea, and off the beach at Kaanapali. As many as 400 permits may be

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[8] "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Kaiser Aetna*, 444 U.S. at 172 (citations omitted).

[9] The presence of an express pre-emption clause in § 5(b) affects only analysis of Petitioners' claim of implied pre-emption. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-289, 115 S.Ct. 1483 (1995) (rejecting categorical rule precluding the coexistence of express and implied pre-emption).

issued to commercial vessels operating from all state facilities statewide. *See* H. Admin. R. § 13-231-58 and 59, and H. Admin. R. § 13-231-67.

Paradise Cruise, Limited, amicus in the court below, operates even larger tour boats. Hawai`i's largest operator, the company offers fourteen different ocean excursions daily from four different state harbors. It carries over 400,000 passengers annually, passengers who have traveled to Hawai`i from around the world. The broad impact of the taxation at issue is indisputable.

The preemptive reach of § 5(b) and allocation of the burden of persuasion are issues that touch the fundamental relationship between the federal government and the states. The court of appeals ignored the practical effect of the assessments on passengers and erroneously relied on the presumption against pre-emption. If left to stand the reported decision of the court of appeals will govern administration of local tax laws. This Court should take this opportunity to make clear that pre-emption in such cases turns not on its label, but on the effects of the tax, both direct and indirect.

3. The Decision of the Lower Court is Incorrect.

Federal law may pre-empt state law expressly or by implication.[10] *Freightliner Corp. v. Myrick*, 514

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[10] The doctrine has its origin in the Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall

U.S. 280, 288-289, 115 S.Ct. 1483 (1995). A federal statute will override state law if its scope indicates Congress intended federal law to occupy the legislative field exclusively, or if there is an actual conflict between state and federal law. *Id.* at 287.

a. Express preemption

When a federal statute "contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Spreitsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *Aloha Airlines v. Dir. of Taxation of Hawai`i*, 464 U.S. at 12 ("when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted."); *see also, Lewis v. City of Chicago, Ill.*, ___ U.S. ___, 130 S.Ct. 2191, 2200 (2010) ("[i]t is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended;").

The wording of § 5(b) allows no doubt as to the intent of Congress to pre-empt state taxation of Petitioners' vessels and their passengers. *Aloha Airlines* is illustrative. At issue there was whether the

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be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

ADAA preempted assessment of GET on the gross receipts of an airline. In relevant part, the act read:

> No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .

464 U.S. at 10.

Despite the lack of ambiguity, the Hawai`i Supreme Court held airline earnings were subject to GET. This Court reversed, explaining:

> The plain language of 49 U.S.C. § 1513(a) would appear to invalidate Haw.Rev.Stat. § 239-6. § 1513(a) expressly preempts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce, and Haw.Rev.Stat. § 239-6 is a state tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. The Hawai`i Supreme Court sought to avoid this direct conflict by looking beyond the language of § 1513(a) to Congress's purpose in enacting the statute.
>
> * * *
>
> We cannot agree with the Hawai`i Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting

> interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted. Thus, the Hawai`i Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).

464 U.S. at 11-12 (citations omitted).

Section 5(b) is equally unambiguous. It too expressly forbids some taxes, while allowing others. There is simply no room for questioning the intent of Congress to expressly preempt state taxation of vessels and their passengers. The lower court acknowledged Petitioners treat GET "as a pass-through charge to their customers/passengers," yet it deemed the financial impact on them insufficient to implicate § 5(b). A.14a. The conclusion is plainly mistaken and warrants review on certiorari.

It has long been the rule that a tax on the earnings of a vessel is in effect a tax on its passengers since, as here, the exaction is ultimately paid by the passenger. *Gloucester Ferry Co.*, *supra*, 114 U.S. at 213 (citing *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875)) (striking down tax imposed on dividends of ferry company). *Henderson* held that a state law requiring an owner of a vessel to give a bond for each passenger was unconstitutional, explaining that:

> In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners

> of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

92 U.S. at 268.

The rule finds parallel in Export Clause cases. The clause states: 'No Tax or Duty shall be laid on Articles exported from any State.' U.S. Const., Art. I, § 9, cl. 5. The clause has never been read as being limited to taxes on articles, but instead has been held to prohibit federal taxation of services and activities closely related to the export process. *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 n.3, 116 S.Ct. 1793 (1996), *citing inter alia Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648 (1901) and *United States v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459 (1915).

Fairbank involved a federal stamp tax on bills of lading for export shipments imposed by the War Revenue Act of 1898. The Court found that the tax was facially discriminatory, 181 U.S. at 290, and, though not directly imposed on the goods being exported, the tax was nevertheless "in effect a duty on the article transported." *Id.*, at 294.

Hvoslef involved taxes on ship charters which did not facially discriminate against exports. The Court nonetheless prohibited the application of those generally applicable, nondiscriminatory taxes to the

transactions at issue because each tax was, in effect, a tax on exports. The type of charter contract at issue in *Hvoslef* was deemed "in contemplation of law a mere contract of affreightment," 237 U.S., at 16. As applied to charters for exportation, the tax "was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." *Id.*, at 17.

In *Bacchus Imports, Ltd. v. Dias, supra*, the State argued wholesalers were not entitled to a refund of GET "since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay within a certain time." 468 U.S. at 277-278. In contrast here, the State persuaded the lower court to disregard the practical effect on passengers of the exaction of GET on Petitioners' gross earnings. The State may not have it both ways. The ICA acknowledged the tax is passed through to otherwise tax exempt passengers through higher fares. For purposes of § 5(b), there can be no distinction between collection of the tax from the passenger at the moment the fare is paid and collection from the vessel operator on receipt of the fare. In each instance the exaction increases the fares ultimately paid by passengers.

The effect on vessel and passenger of the exaction of the GET at issue is even more direct. The tax is imposed on vessel owner based on the earnings of an exempt vessel. [11] The singular source of those

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[11] The effect of Haw.Rev.Stat. § 237-41.5 is to render Petitioners collection agents. It allows the State to accomplish through chapter 237 what § 5(b) expressly prohibits - - taxation of

earnings is the fares paid by tax exempt passengers who ultimately bear the financial burden of the tax. *Hvoslef* disavowed taxation of a transaction in contemplation of exportation. Here, exaction of GET on the fares paid by passengers is, as this Court recognized in *Aloha Airlines*, at best indirect taxation of the gross receipts of a transaction involving transportation - - fares paid by tax exempt passengers for transportation aboard a tax exempt vessel. This result, permissible only by reading the term "vessel" to exclude its owner and operator, is inconsistent with this Court's historic approach to questions of preemption in the maritime context. Historically, the answer would turn on the effect of the exaction, not its label.

A common theme thus underlies the Commerce and Tonnage Clauses and section 445 - - states should not be allowed to exploit their proximity to navigable waterways, whether to the detriment of those residing in or visiting from neighboring states. In enacting section 445 Congress intended to clarify - - not curtail - - existing federal law relating to the taxation of vessels and their passengers. This body of law views instruments of maritime commerce as embodying vessel owner and operator, and the exemption of passengers from local taxation as foreclosing their taxation indirectly through taxation of the vessel operator. *See State, Dept. of Natural Res. v. Alaska Riverways*, ., 232 P.3d 1203, 1222 (Alaska 2010) (State agency violated § 5(b) by charging tour boat operator $0.25 per passenger carried as rent for use of unimproved state-owned shore lands: "DNR's

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passengers and the gross earnings of the tax exempt vessels that carry them.

proposed assessment on Alaska Riverways, however labeled, is a charge exacted specifically for the use of navigable waters--in this case, $0.25 for each paying passenger--and therefore applies.").

The point is underscored by § 5(b)'s exception for tonnage duties under 33 U.S.C. § 2236. That statute confers on any party who suffers "legal wrong or is adversely affected or aggrieved by the imposition of port or harbor dues" standing to sue in district court. *Id. at* (b)2-(b)3. Congress in providing a federal forum recognized that the practical effect of wrongful levies would not be limited to vessels, but would aggrieve their owners and operators. It is thus inconceivable that Congress in exempting vessels from taxation would expect their owners to be taxed based on the value of the exempt vessel or the gross value of the fares paid by exempt passengers.

Congressional efforts to clarify the preemptive scope of § 5(b) support reading the term "vessel" to encompass its earnings. As noted, the conference committee understood the ban on taxation of vessels would be read as precluding their taxation as property. Liability for such taxes is personal; i.e., it is a burden of ownership. Taxing authorities look to the owner, not the property itself, for payment. If the term "vessel" excluded their owners, as the ICA believed, the amendment to allow taxation of vessels as property would have been an idle act; vessel owners were unaffected by the exemption of their vessels from taxation. Petitioners submit in restoring the power to tax vessels as property there was no need to state the obvious - - that the exemption from property taxes

would extend to vessel owners as the party responsible for their payment.

In sum, the lower court's literal reading of "vessel" and "passenger" was the product of misapplication of the presumption against pre-emption, misreading of legislative intent, and manifest disregard of historical backdrop. Section 5(b) expressly pre-empts use of the earnings of a tax exempt vessel from fares paid by tax exempt passengers to determine a vessel owner's liability for a state's occupational privilege tax.

b. Implied Preemption

While unnecessary to decision in this case, it is clear that § 5(b) impliedly pre-empts assessment of GET based on passenger fares. Both types of implied preemption are present: field and conflict. *Geier v. American Honda Co.*, 529 U.S. 861, 874, 120 S.Ct. 1913, 1922. The field Congress occupied in enacting § 5(b) is unmistakable. The statute prohibits taxation of vessels operating on navigable waters or the passengers they carry, except for harbor dues, reasonable fees for services actually rendered and property taxes. This leaves no room for the excise taxes protested by Petitioners. Taxation of vessel earnings resulting from passenger fares, irrespective of how they are labeled, encroaches on a field occupied by the federal government and is thus preempted. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375-376 (1954) ("However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy").

Present also is actual conflict between state and federal law. First, § 5(b) prohibits any "non-federal interest" from imposing any taxes, tolls or operating charges on exempt passengers, yet state law renders Petitioners' owner personally liable for such taxes if they are not passed through to their passengers. The risk of personal liability may be avoided by adding GET to passenger fares and holding the amount collected in trust for the benefit of the state. The resulting conflict is palpable. State law allows Petitioners to collect GET from their passengers as cost recovery, yet they violate § 5(b) by adding the taxes to passenger fares. It is no answer to say Petitioners are not compelled to pass on this cost. For purposes of pre-emption it suffices that the taxes at issue are measured by the charter fares passengers are required to pay.

Taxation of the owners based on the earnings of tax exempt vessels also creates an obstacle to uniform federal regulation of maritime commerce, a primary reason for adoption of the Constitution. *United States v. Locke*, 529 U.S. at 99, 120 S.Ct. at 1143. Long ago the Supreme Court recognized the paramount power of Congress "to prescribe the rules by which [maritime commerce] shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." *Gloucester Ferry Co.*, 114 U.S. at 203-204. This Court has routinely held that the power to exercise control over and to regulate the navigable waterways of the United States rests squarely with Congress. *Gibson v. United States*, 166 U.S. 269, 17 S. Ct 578, 41 L. Ed. 996 (1897) (holding that all navigable waters are under control of United States for purpose of regulating and improving navigation); *Leovy v.*

United States, 177 U.S. 621, 20 S Ct. 797, 44 L. Ed. 914 (1900) (finding that power of Congress to regulate navigable waters, while not expressly granted in the Constitution, "is a power incidental to express power to regulate commerce with foreign nations, among the states, and with Indian Tribes"). "[T]he smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities. . . ." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676, 102 S.Ct. 2654, 2659 (holding that federal maritime law pre-empts application of state law which imposes a greater sanction or liability on vessel owners than that imposed by federal law). Allowing Hawai`i to tax owner-operators clearly obstructs the goal of Congress in exempting vessels and passengers from local taxation.

CONCLUSION

Respondents again apply Hawai`i's tax laws to reach earnings Congress has expressly exempted from local taxation. Doing so affects hundreds of business operating tax exempt vessels and hundreds of thousands of passengers who themselves are exempt from taxation. While Respondents may levy a privilege tax on Petitioners, § 5(b) does not allow such tax to be measured by the earnings of tax exempt vessels or the charter fares paid by tax exempt passengers.

The issue is squarely presented and worthy of this Court's review. It is respectfully submitted that the petition should be granted so that the Court may answer the question presented.

Respectfully submitted,

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NO. 29598
SUPREME COURT OF HAWAI'I

IN THE MATTER OF THE TAX APPEAL OF
REEL HOOKER SPORTFISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

EXACT GAME FISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

FINEST KIND, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION, Reel Hooker Sportfishing
Defendant-Appellee

October 19, 2010, Decided

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS. CASE NOS. 07-0072, 07-0073, AND 07-0074.

By: Duffy, J., for the court[1]

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

Petitioners/Plaintiffs-Appellants Reel Hooker Sportfishing, Inc., Exact Game Fishing, Inc., and Finest Kind, Inc.'s application for writ of certiorari, filed on September 7, 2010, is hereby rejected.

DATED: Honolulu, Hawai'i, October 19, 2010.

FOR THE COURT:

/s/ James E. Duffy, Jr.

Associate Justice

Footnote

1Considered by: Recktenwald, C.J., Nakayama, Acoba, and Duffy, JJ. and Circuit Judge Kim, assigned by reason of vacancy.

NO. 29598
INTERMEDIATE COURT OF APPEALS
OF HAWAI'I

IN THE MATTER OF THE TAX APPEAL OF
REEL HOOKER SPORTFISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

EXACT GAME FISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

FINEST KIND, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION, Reel Hooker Sportfishing
Defendant-Appellee

May 28, 2010, Decided
May 28, 2010, Filed

APPEAL FROM THE TAX APPEAL COURT. CASE
NOS. 07-0072, 07-0073 and 07-0074.

JUDGMENT ON APPEAL

(By: Leonard, J., for the court)[1]

Pursuant to the Opinion of the Intermediate Court of Appeals of the State of Hawai'I entered on May 28, 2010, the Hawai'i Tax Appeal Court's December 22, 2008 Consolidated Judgment is affirmed. Judgment is hereby entered on this appeal.

DATED: Honolulu, Hawai'i, August 31, 2010

Footnote

1Foley, Presiding Judge, Fujise and Leonard, JJ.

NO. 29598
INTERMEDIATE COURT OF APPEALS
OF HAWAI'I

IN THE MATTER OF THE TAX APPEAL OF
REEL HOOKER SPORTFISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

EXACT GAME FISHING, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION,
Defendant-Appellee,

and

FINEST KIND, INC.,
Plaintiff-Appellant
v.
STATE OF HAWAI'I, DEPARTMENT OF
TAXATION, Reel Hooker Sportfishing
Defendant-Appellee

May 28, 2010, Decided
May 28, 2010, Filed

APPEAL FROM THE TAX APPEAL COURT. CASE
NOS. 07-0072, 07-0073 and 07-0074.

COUNSEL: Dennis Niles, (Shannon S. Imlay and Ronald N.W. Kim with him on the briefs), (Paul Johnson Park & Niles), for Plaintiffs-Appellants.

Damien A. Elefante, Deputy Attorney General (Hugh R. Jones, Deputy Attorney General, with him on the brief, for Appellee, STATE OF HAWAI'I, DEPARTMENT OF TAXATION.

FOLEY, PRESIDING JUDGE, FUJISE AND LEONARD, JJ.

OPINION OF THE COURT BY LEONARD, J.

This is a tax appeal case in which the taxpayers, who are in the charter boat fishing business, challenge the assessment of Hawai'i General Excise Tax (GET) on their businesses on the ground that a federal statute limiting non-federal taxes upon vessels operating in U.S. navigable waters, 33 United States Code (U.S.C.) § 5(b) (2006), preempts the application of the Hawai'i GET statute, Hawaii Revised Statutes (HRS) § 237-13(6)(A) (2001 & Supp. 2008), to their charter fishing revenue. Plaintiffs-Appellants Reel Hooker Sportfishing, Inc., Exact Game Fishing, Inc., and Finest Kind, Inc. (collectively Taxpayers) appeal from the Consolidated Judgment entered on December 22, 2008 (Judgment), by the Hawai'i Tax Appeal Court (Tax Appeal Court),[1] which entered Judgment against Taxpayers and in favor of Defendants-Appellees Director of Taxation, State of Hawai'i, and Department of Taxation, State of Hawai'i (State).[2] We hold that 33 U.S.C. § 5(b) does not preempt the assessment of Hawai'i GET on the charter fishing revenue of these Hawai'i businesses because GET is a tax assessed on

gross business receipts for the privilege of doing business in Hawai'i, and is not a tax on their vessels or passengers.

I. BACKGROUND

Taxpayers are Hawai'i corporations, incorporated under and in accordance with the laws of the State of Hawai'i. Taxpayers own and operate three passenger vessels that are licensed by the federal government to carry up to six passengers in the "coastwise" trade. The coastwise endorsement entitles the vessels to unrestricted access to the navigable waters surrounding the islands of Maui, Lanai and Molokai. Taxpayers are in the charter fishing business, providing customers with the opportunity to fish for various species of pelagic game fish, including marlin, tuna, ono (wahoo), and mahimahi. The fishing excursions originate at Maui's Lahaina Harbor.

The principal source of Taxpayers' earnings is the fares paid by their charter passengers. Since beginning operations decades ago, Taxpayers have added GET to the charter fares collected from their passengers, which is consistent with the practice in the charter fishing industry.

On or about June 22, 2007, Taxpayers each filed a complaint against the State in the Tax Appeal Court, seeking relief from GET assessments for tax years 2004 and 2005. In their complaints, Taxpayers requested refunds for amounts paid under protest pursuant to HRS § 40-35 (1993), claiming that the State improperly imposed GET under HRS § 237-13(6)(A)[3] because it is preempted by 33 U.S.C. § 5(b).[4]

On October 22, 2007, the Tax Appeal Court entered a stipulation and order consolidating Taxpayers' three cases under Tax Appeal Case No. 07-0072. Taxpayers subsequently filed a first amended complaint on December 24, 2007. In response, the State filed a consolidated answer on January 3, 2008.

The Tax Appeal Court heard the parties' cross-motions for summary judgment on November 3, 2008. On December 22, 2008, the Tax Appeal Court entered orders granting summary judgment to the State and denying the Taxpayers' motions. Final judgment also was entered. On January 21, 2009, Taxpayers timely filed a notice of appeal.

II. POINTS OF ERROR

On appeal, Taxpayers contend that the Tax Appeal Court erred because it: (1) looked beyond 33 U.S.C. § 5(b)'s plain, unambiguous and explicit prohibition of state taxation of the earnings on Taxpayers' vessels; (2) construed 33 U.S.C. § 5(b) to allow assessment of GET on the charter revenue of Taxpayers' vessels notwithstanding a resulting direct conflict with the federal law; and (3) construed 33 U.S.C. § 5(b) to allow a privilege tax on Taxpayers' business of transporting passengers to and from a state boat harbor.

III. APPLICABLE STANDARD OF REVIEW

"We review the circuit court's grant or denial of summary judgment *de novo*." *Querubin v. Thronas*, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting *Durette v. Aloha Plastic Recycling, Inc.*, 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)). Likewise, the meaning of a

statute is a question of law that is reviewed *de novo*. See, e.g., *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009).

IV. DISCUSSION

The dispositive issue in this tax appeal is whether HRS § 237-13(6)(A) is preempted by the Marine Transportation Security Act of 2002, codified at 33 U.S.C. § 5(b). A state law is preempted by federal law when there is (1) express preemption or (2) implied preemption.

Express preemption exists when Congress makes its intent known through explicit statutory language preempting state action in a given area. See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986). When the text of an express preemption clause is susceptible to multiple interpretations, courts generally accept the reading that disfavors preemption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005).

Implied preemption occurs when there is either (1) conflict preemption or (2) field preemption. A state law is preempted under the conflict preemption doctrine when it is impossible to comply with both the state and federal laws, or when the state law impedes the objectives of the federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). Field preemption occurs when the federal

legislative scheme is so pervasive that it occupies the field, leaving r , room for states to supplement federal law. *Id.* at 98, 115.

The United States Supreme Court has held that the burden of establishing preemption rests with the party who is seeking the benefit of it. *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997). That party must therefore "bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *Id.* Thus, preemption is disfavored unless the "nature of the regulated subject matter permits no other conclusion" or "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).

In analyzing whether a state law is preempted, the "purpose of Congress is the ultimate touchstone." *Retail Clerks Intern. Ass'n., local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). The purpose of Congress can be "explicitly stated in the statute's language, or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

A. Hawai'i GET

Pursuant to HRS § 237-13(6)(A), GET is levied, assessed, and collected upon "every person engaging or continuing within the State in any service business or calling including professional services not otherwise specifically taxed," which indisputably includes

Taxpayers' gross income from their charter fishing business. GET is a tax on gross income or gross receipts. See HRS § 237-3 (2001). The Hawai'i Supreme Court has described GET as a tax on the privilege of doing business in the State.

> Hawai'i's general excise tax is a gross receipts tax on the privilege of doing business in Hawai'i, thus Hawai'i's general excise tax is a privilege tax. . . . A privilege tax is assessed a party based on the fact that the party chose to engage in business activity within the state. Such a tax is justified on the ground that companies conducting business enjoy the protections and benefits given by the state.

In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi, 103 Hawai'i 359, 365, 82 P.3d 804, 810 (2004) (citations and footnote omitted; format altered).

B. Express Preemption

Taxpayers argue that 33 U.S.C. § 5(b) expressly preempts the imposition of GET on the earnings of their vessels, emphasizing the statutory language as follows: "No taxes . . . shall be levied upon or collected from any vessel . . . or from its passengers . . . by any non-federal interest," if the vessel is operating on any navigable waters of the United States.

The Supreme Court has emphasized that the plain language of federal laws must be narrowly construed because of the presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 505, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). In this case, the

plain language of 33 U.S.C. § 5(b) prevents anyone except the federal government from imposing a tax on a vessel or on its passengers or crew, while that vessel is operating on navigable waters. In contrast, HRS § 237-13(6) (A) requires Hawai'i businesses to pay a privilege tax for engaging and conducting business in the State of Hawai'i. Contrary to Taxpayers' assertion, the express language of 33 U.S.C. § 5(b) does not explicitly prohibit a state from taxing a corporation's gross income for engaging in business in that state. The federal statute refers only to *vessels* and their *passengers and crews*, and simply does not address the business revenue or gross income generated by a business that operates the vessel.

Indeed, the case cited by Taxpayers as "illustrative" of their express preemption argument in fact undercuts it. In *Aloha Airlines, Inc. v. Director of Taxation of Hawai'i*, 464 U.S. 7, 104 S. Ct. 291, 78 L. Ed. 2d 10 (1983), the Supreme Court found that the explicit language of 49 U.S.C. § 1513(a) preempted taxes levied and assessed upon the gross income of an airline pursuant to HRS § 239-6 (1970).[5] As noted in Aloha Airlines, 49 U.S.C. § 1513(a) expressly states that "no state . . . shall levy a tax . . . on persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom.*" 464 U.S. at 11 (emphasis added). The Court found that HRS § 239-6 was expressly preempted because it imposes a state tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. Id. The statute at issue in Aloha Airlines plainly differs from the statute at issue in this case because the explicit language of 33 U.S.C. § 5(b) does not prohibit a state from imposing a tax on the gross

income of businesses within that state. Since Congress has not explicitly and unambiguously prohibited states from imposing taxes on the gross income of businesses in 33 U.S.C. § 5(b), there is no express preemption through its statutory language. As argued by the State, if Congress had intended in 33 U.S.C. § 5(b) to preempt states from imposing taxes on the gross income or gross receipts derived from commerce over navigable waters, it could have so stated, as was done in 49 U.S.C. § 1513(a).

Inherent in Taxpayers' express preemption argument is the contention that any tax on the gross receipts received by Taxpayers for carrying passengers aboard their vessels is in fact a tax on the vessel and passenger alike. This proposition is simply not supported by the authorities relied on by the Taxpayers nor any others that have been considered by this court. See, e.g., *Gloucester Ferry Co. v. Penn.*, 114 U.S. 196, 5 S. Ct. 826, 29 L. Ed. 158 (1885) (cited by Taxpayers) (rejecting, as an interference with interstate commerce, Pennsylvania's attempt to tax dividends of a New Jersey ferry company that merely loaded and unloaded passengers and freight at a Philadelphia dock). Particularly in light of strong presumption against preemption, we decline to broadly construe the term "vessel" to include the gross income generated by a taxpayer's use of its vessel.

Thus, we reject Taxpayers' argument that 33 U.S.C. § 5(b) expressly preempts the assessment of GET.

C. Implied Preemption

1. Conflict Preemption

Taxpayers contend that HRS § 237-13(6)(A) is impliedly preempted because it is in direct conflict with 33 U.S.C. § 5(b). Specifically, Taxpayers argue that "state law is violated if Taxpayers do not pay the [GET] tax, yet if they do so, they violate federal law by collecting it on behalf of the state."

First, this is a faulty premise. For better or worse, HRS § 237-13(6)(A) requires only that businesses pay GET to the State, it does not require that businesses collect this tax from their customers. While collection of the GET from customers and clients is a common, arguably uniform, practice that is not prohibited by Hawai'i law, the GET is a privilege tax on the business, not its customer. The fact that Taxpayers fund their payment of the GET through a pass-through charge to their customers/passengers does not change the nature of the GET from a tax on their businesses to a tax on their passengers.

Taxpayers also argue that the imposition of GET on their charter fishing business impedes the objectives of the federal law and, therefore, is barred by the conflict preemption doctrine. Taxpayers contend that the purpose of 33 U.S.C. § 5(b) was to decrease the financial burden on vessel operators and their passengers by exempting them from state and local taxes that interfere with interstate commerce by mandating a broad prohibition against state and local taxation. The legislative history suggests a more targeted concern and more narrow legislative solution. The U.S. House Conference Report states that the purpose of 33 U.S.C. § 5(b) was "to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel," and "to prohibit fees and taxes on a vessel simply

because that vessel sails through a given jurisdiction." H.R. Rep. No. 108-334, at 180 (2002) (Conf. Rep.) (emphasis added). The Report also notes that the amendment did "not affect whether sales or income taxes are applicable with respect to vessels." Id. Indeed, a sponsor of the bill that was codified as 33 U.S.C. § 5(b) explained the purpose of the legislation as follows:

> [The proposed legislation] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in the case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation.

148 Cong. Rec. E2143-04 (2002).

Taxpayers and *Amicus Curiae* Paradise Cruise, Limited, dba Star of Honolulu Cruises & Events (Amicus Curiae) also ask this court to consider an unpublished Tennessee decision concluding that 33 U.S.C. § 5(b) preempted a Tennessee privilege tax law. Upon review, however, the statute at issue in *High County Adventures, Inc. v. Polk County*, No. E2007-02678-COA-R3-CV, 2008 Tenn. App. LEXIS 651, 2008 WL 4853105 (Tenn. Ct. App., November 10, 2008), levied a privilege tax upon consumers participating in commercial whitewater rafting excursions, not upon the rafting businesses, although the businesses were tasked with collecting the tax from their customers/passengers. The Tennessee court, noting the lack of any explicit preemption language in 33 U.S.C. § 5(b), held that there was a manifest and irreconcilable conflict between Polk County's privilege tax on consumers participating in rafting excursions on navigable waters and the federal law. 2008 Tenn. App. LEXIS 651, [WL] at *12-13.[6] As Taxpayers, in their role as Hawai'i businesses, and not their boating customers/passengers, are taxed pursuant to HRS § 237-13(6)(A), the Tennessee court's rationale is inapplicable to this case.

2. Field Preemption

Taxpayers argue that taxation of the earnings from their vessels pursuant to HRS § 237-13(6)(A) creates an obstacle to uniform federal regulation of maritime commerce and Amicus Curiae argues that federal law so fully occupies the legislative field that the GET is impliedly preempted. While we recognize the broad scope of federal maritime legislation, we fail to see how the imposition of GET on the gross receipts of

Taxpayers' charter fishing businesses interferes in any way with the uniform federal regulation of maritime commerce. Accordingly, we reject the argument that the doctrine of field preemption is applicable to this case.

V. CONCLUSION

For the foregoing reasons, the Circuit Court's December 22, 2008 Judgment is affirmed.

DATED: Honolulu, Hawai'i, May 28, 2010.

/s/ Daniel R. Foley
Presiding Judge

/s/ Alexa D.M. Fujise
Associate Judge

/s/ Katherine G. Leonard
Associate Judge

Footnotes

1The Honorable Gary W.B. Chang presided.

2Taxpayers also seek relief from the following orders, also entered on December 22, 2008: (1) Order Granting Director of Taxation, State of Hawai'i and Department of Taxation, State of Hawai'i's Motion for Summary Judgment Filed October 10, 2008; (2) Order Denying Reel Hooker Sportfishing, Inc.'s Motion for Summary Judgment on First Amended Complaint to Recover Monies Paid Under Protest Pursuant to HRS § 40-35 Filed August 26, 2008; (3) Order Denying Exact Game

Fishing, Inc.'s Motion for Summary Judgment on First Amended Complaint to Recover Monies

Paid Under Protest Pursuant to HRS § 40-35 Filed August 21, 2008; and (4) Order Denying Finest Kind, Inc.'s Motion for Summary Judgment on First Amended Complaint to Recover Monies Paid Under Protest Pursuant to HRS § 40-35 Filed August 26, 2008.

3HRS § 237-13(6)(A) (2001) provides:

> Upon every person engaging or continuing within the State in any service business or calling including professional services not otherwise specifically taxed under this chapter, there is likewise hereby levied and shall be assessed and collected a tax equal to four percent of the gross income of the business, and in the case of a wholesaler under section 237-4(a)(10), the tax shall be equal to one-half of one percent of the gross income of the business. Notwithstanding the foregoing, a wholesaler under section 237-4(a)(10) shall be subject to section 237-13.3.

433 U.S.C. § 5(b) provides:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or [*5] under the right to freedom of navigation on those

> waters, except for (1) fees charged under section 2236 of this title; (2) reasonable fees charged on a fair and equitable basis that (A) are used solely to pay the cost of a service to the vessel or water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; and (C) do not impose more than a small burden on interstate or foreign commerce; or (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

5During the relevant period, HRS § 239-6 provided, in part:

> Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.

6We are also unpersuaded by the August 30, 2005 order issued by a trial court in Pennsylvania, *i.e.*, the Court of Common Pleas of Fayette County, Pennsylvania (No. 220 of 2005, G.D.), that was provided by Amicus Curiae. In contrast to our analysis here, the Pennsylvania court summarily construed its statute as levying a tax on the use of the river. As discussed above, Hawai'i courts have long held GET to be a privilege tax on businesses,

for the privilege of doing business in Hawai'i, without regard to the nature of the business. Thus, we reject the notion that Taxpayers are being taxed simply for their use of Hawai'i's navigable waters.

Filed 12/22/2008
Consolidated
CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074

IN THE TAX APPEAL COURT
OF THE STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC.
Plaintiff,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

EXACT GAME FISHING, INC.
Plaintiff,

v.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

FINEST KIND, INC.
Plaintiff,

v,

DEPARTMENT OF TAXATION, STATE HAWAII; KURT K. KAWAFUCHI, in his capacity as a DIRECTOR OF TAXATION, STATE OF HAWAII, Defendants.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that in accordance with Rule 29 of the Tax Appeal Court and Rule 58 of the Hawaii Rules of Civil Procedure and pursuant to the following orders:

1. ORDER GRANTING DIRECTOR OF TAXATION, STATE OF HAWAII AND DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 10, 2008;

2. ORDER DENYING REEL HOOKER SPORTFISHING, INC.'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES PAID UNDER PROTEST PURSUANT TO HRS § 40-3 FILED AUGUST 26,2008;

3. ORDER DENYING EXACT GAME FISHING, IND.'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES PAID UNDER PROTEST PURSUANT TO HRS § 40-35 FILED AUGUST 21, 2008; and

4. ORDER DENYING FINEST KIND, INC.'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES

PAID UNDER PROTEST PURSUANT TO HRS § 40-3 FILED AUGUST 20, 2008.

JUDGMENT IS HEREBY entered in favor of Defendants DIRECTOR OF TAXATION, STATE OF HAWAII and DEPARTMENT OF TAXATION, STATE OF HAWAII and against Plaintiffs REEL HOOKER SPORTFISHING, INC., EXACT GAME FISHING, INC., and FINEST KIND, INC. (collectively, "'Plaintiffs") upon all claims stated in their First Amended Complaint to Recover Monies Paid Under Protect Pursuant to HRS § 40-5 filed on December 4, 2007 ("First Amended Complaint").

At the time of the filing of the First Amended Complaint, the respective general excise tax liabilities for the Plaintiffs were as follows:

Plaintiff	Period	General Excise Tax Liability
Reel Hooker Sportfishing, Inc.	2004	$12,065.10
	2005	$14,353.16
Exact Game Fishing, Inc.	2004	$8460.07
	2005	$11,446.15
Finest Kind, Inc.	FYE 8/2004	$7,844.79
	FYE 8/2005	$15,126.02

Plaintiffs are liable far the above-stated amounts including applicable interest as provided by law.

This final judgment disposes of all claims and all parties in this action.

Filed 12/22/2008
Consolidated
CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074

IN THE TAX APPEAL COURT
OF THE STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC.
Plaintiff,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

EXACT GAME FISHING, INC.
Plaintiff,

v.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

FINEST KIND, INC.
Plaintiff,

v,

DEPARTMENT OF TAXATION, STATE HAWAII; KURT K. KAWAFUCHI, in his capacity as a DIRECTOR OF TAXATION, STATE OF HAWAII, Defendants.

ORDER GRANTING DIRECTOR OF TAXATION, STATE OF HAWAII AND DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 10, 2008

Defendants DIRECTOR OF TAXATION, STATE OF HAWAII and DEPARTMENT OF TAXATION, STATE OF HAWAII's (collectively "Department") Motion for Summary Judgment filed on October 10, 2008 ("Motion") came on for hearing on Monday, November 3, 2008 at 9:00 a.m. before the Honorable Gary W.S. Chang. Damien A. Elefante, Deputy Attorney General, appeared on behalf of the Department and Dennis Niles, Esq., appeared on behalf of Plaintiffs REEL HOOKERSPORTFISHING, INC., EXACT GAME FISHING, INC., and FINEST KIND, INC. (collectively "Taxpayers"). The Court, having considered the record and pleadings herein, the Motion, memoranda, and arguments presented at the hearing, and the Court having been fully advised in the premises and good cause appearing therefore,

ACCORDINGLY, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the Department's Motion for Summary Judgment filed on October 10, 2008 is hereby GRANTED for the reasons stated at the November 8, 2008 hearing.

Filed 12/22/2008
Consolidated
CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074

IN THE TAX APPEAL COURT
OF THE STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC.
Plaintiff,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

EXACT GAME FISHING, INC.
Plaintiff,

v.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

FINEST KIND, INC.
Plaintiff,

v,

DEPARTMENT OF TAXATION, STATE HAWAII; KURT K. KAWAFUCHI, in his capacity as a DIRECTOR OF TAXATION, STATE OF HAWAII, Defendants.

ORDER DENYING EXACT GAME FISHING, INC.'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES PAID UNDER PROTEST PURSUANT TO HRS Sec. 40-35 FILED AUGUST 21, 2008

Plaintiff EXACT GAME FISHING, INC'S Motion for Summary Judgment on First Amended Complaint to Recover Monies Paid Under Protest Pursuant to HRS § 40-35 filed on August 20, 2008 ("Motion to Summary Judgment") came on for hearing on Monday, November 3, 2008 at 9:00 a.m. before the Honorable Gary W.B. Chang. Dennis Niles, Esq., appeared on behalf of Plaintiff EXACT GAME FISHING, INC. and Damien A. Elefante, Deputy Attorney General, appeared on behalf of the Defendants DIRECTOR OF TAXATION, STATE OF HAWAII and DEPARTMENT OF TAXATION STATE OF HAWAII. The Court, having considered the record and pleadings herein, the Motion for Summary Judgment, memoranda, and arguments presented at the hearing, and the Court having been fully advised in the premises and good cause appearing therefore,

ACCORDINGLY, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff EXACT GAME FISHING, INC.'s Motion for Summary Judgment is hereby DENIED for the reasons stated at the November 3, 2008 hearing.

Filed 12/22/2008
Consolidated
CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074

IN THE TAX APPEAL COURT
OF THE STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC.
Plaintiff,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

EXACT GAME FISHING, INC.
Plaintiff,

v.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

FINEST KIND, INC.
Plaintiff,

v,

DEPARTMENT OF TAXATION, STATE HAWAII; KURT K. KAWAFUCHI, in his capacity as a DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

KIND, INC'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES PAID UNDER PROTEST PURSUANT TO HRS SEC. 40-35 FILED AUGUST 26 ,2008

Plaintiff FINEST KIND, INC.'s Motion for Summary Judgment on First Amended Complaint to Recover Monies Paid Under Protest Pursuant to HRS § 40-35 filed on August 26, 2008 ("Motion for Summary Judgment") came on for hearing on Monday, November 3, 2008 at 9:00 a.m. before the Honorable Gary W. B. Chang. Dennis Niles, Esq., appeared on behalf of Plaintiff FINEST KIND, INC. and Damien A. Elefante, Deputy Attorney General, appeared on behalf of the Defendants DIRECTOR OF TAXATION, STATE OF HAWAII and DEPARTMENT OF TAXATION, STATE OF HAWAII.

The Court, having considered the record and pleadings herein, the Motion for Summary Judgment, memoranda, and arguments presented at the hearing, and the Court having been fully advised in the premises and good cause appearing therefore,

ACCORDINGLY, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff FINEST KIND, INC.'s Motion for Summary Judgment is hereby DENIED for the reasons stated at the November 3, 2008 hearing.

Filed 12/22/2008
Consolidated
CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074

IN THE TAX APPEAL COURT
OF THE STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC.
Plaintiff,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

EXACT GAME FISHING, INC.
Plaintiff,

v.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

FINEST KIND, INC.
Plaintiff,

v,

DEPARTMENT OF TAXATION, STATE HAWAII; KURT K. KAWAFUCHI, in his capacity as a DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendants.

ORDER DENYING REEL HOOKER SPCRTFISHING, INC.'S MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED COMPLAINT TO RECOVER MONIES PAID UNDER PROTEST PURSUANT TO HRS § 40-35 FILED AUGUST 26, 2008

Plaintiff REEL HOOKER SPORTFISHING INC.'S Motion for Summary Judgment on First Amended Complaint to Recover Monies Paid Under Protest Pursuant to HRS § 40-35 filed on August 26, 2008 ("Motion for Summary Judgment") came on for hearing on Monday, November 3, 2003 at 9:00 a.m. before the Honorable Gary W.S. Chang. Dennis Niles, Esq., appeared on behalf of Plaintiff REEL HOOKER SPORT FISHING, INC. and Damien A. Elefante, Deputy Attorney General, appeared on behalf of the Defendants DIRECTOR OF TAXATION, STATE OF HAWAII and DEPARTMENT OF TAXATION, STATE OF HAWAII.

The Court, having considered the record and pleadings herein, the Motion for Summary Judgment, memoranda, and arguments presented at the hearing, and the Court having been fully advised in the premises and good cause appearing therefore

ACCORDINGLY, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff REEL-HOOKER SPORT FISHING, INC.'s Motion for

Summary Judgment is hereby DENIED for the reasons stated at the November 3, 2008 hearing.

CASE NO. 07-0072
CASE NO. 07-0073
CASE NO. 07-0074
(Consolidated)

IN THE LAND & TAX APPEAL COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

REEL HOOKER SPORTFISHING, INC., et al.
Plaintiffs,

vs.

DEPARTMENT OF TAXATION, STATE OF HAWAII; KURT K. KAWAFUCHI, in his capacity as DIRECTOR OF TAXATION, STATE OF HAWAII,
Defendant.

TRANSCRIPT OF PROCEEDINGS before the Honorable GARY W.B. CHANG, Judge, presiding on November 3, 2008.

(Clerk calls the case.)

R. NILES: Good morning, Your Honor. Dennis Niles on behalf of the plaintiffs. With me is Mr. Hudson who is the principal in the three companies.

MR. ELEFANTE: Good morning, Your Honor. Damien Elefante on behalf of the Department of Taxation, State of Hawaii-.

THE COURT: Good morning. Have a seat. I wanted to ask a historical or philosophical question. What is it that

the Constitution and Congress was intending to do in terms of these -- the tonnage provision as well as the MTSA provision? What is it that they were trying to accomplish?

MR. NILES: Would you like me to address that?

THE COURT: That would be fine.

MR. NILES: And I think that's an insightful question for this reason: The cases teach that we look to the language of the statute to glean the intent of Congress. And here it is, of course, our contention that the language of the statute, Section 5B, i unambiguous. The State has not argued that there is a provision that is ambiguous, lends itself to uncertainty a to meaning. So we look to the straight forward language of the statute to glean what congress intended.

Now, we acknowledge that there are remarks in the legislative history that counsel for the Department has cited that would suggest that the statute was focused on a specific issue. We cite other language when we set out the more complete history of this particular measure that indicates that the intent of congress gees back to the fundamental issue of whether it is appropriate for a state to tax revenue earned using what is, I call, a federal waterway or a national waterway. And that's the nub of it.

We believe sincerely that this statute, which has been characterized a an extension of commerce clause and tonnage clause, Supreme court decisions really captures the essence that you cannot tax use of this waterway,

these navigable waters, as a general revenue measure. So in adopting the statute, they drew what we contend is a very, very bright line.

Now, I want to add one other part that I think is critical to, you know, the historical perspective. And that is these companies pay the State of Hawaii a commercial use fee for the facilities that they use at Lahaina Harbor. So I want to dispel any concern on the part of the Court that the plaintiffs are seeking a free lunch. They are not seeking a free lunch. They are paying, and we have presented evidence in the record that the amount that they are paying exceeds any fair valuation of the services that they actually receive.

THE COURT: Excuse me for interrupting, but I asked a specific question. I understood your whole argument about the harbor running at a profit because the fees they collect are more than enough to run the operation.

So I'm not curious about that. Let me ask a different question with a hypothetical. Let's say you have two akuli vendors, both selling fish at Lahaina Harbor. One, akuli vendor number one, is entirely land-bound. He has a truck that's refrigerated. He drives into the harbor and sells his akuli there. That's situation one.

Vendor number two, instead of being land-bound is ocean-bound and catches the akuli in our navigable waters and then comes to the harbor for his 30-minute period of time, and in that 30-minute period of time on the dock sells akuli.

Now, are you telling me that the State can tax the land-bound vendor but not the ocean-bound vendor for general excise tax?

MR. NILES: We have not made that argument.

THE COURT: Well, that's why I asked the question. What is the essence of what this legislation and tonnage is designed to or addressing?

MR. NILES: To prohibit any nonfederal interest from taxing a vessel, its crew or passengers when that vessel is operating on navigable waters.

THE COURT: And why is that?

MR. NILES: why __

THE COURT: Why?

MR. NILES: what was Congress thinking when it enacted this legislation?

THE COURT: Yes.

MR. NILES: It was, in my judgment what the consideration was, these are federal waterways and it has been long the doctrine that if vessels are operating on federal waters, the State may charge them a fee for use of facilities or services but it may not tax the use of those waters as a general revenue measure. And so our premises, Your Honor, our premise is that this statute was intended to basically codify the notion that earnings of a vessel operating on navigable waters are beyond the reach of the taxing power of the State. And,

I mean, when you have a statute the whole purpose of citing the Aloha Airlines case was to drive home the point where you have a statute that is free of ambiguity and if that statute is within the power of Congress, that is as far as this Court should go. It's as far as the Supreme Court should go. It sets the framework.

And so even in Aloha Airlines, there are footnotes where the Court said yes, there are questions about what the motivation was and whether this was a proper way of doing it, but the Supreme Court said we understand that. But you don't look beyond the language of the statute as the Hawaii Supreme Court had done in the Aloha Airlines case.

And so that's why it, to me, it comes back to the role of this Court, and I recognize the challenge that this Court faces. But we have a statute that is free of ambiguity and it makes clear the State may not do this.

THE COURT: Why? And I focus the question on why. Why is taxing the revenues generated by a navigable water-bound vessel beyond the taxing power of the State? Why? I there an evil associated with that? Is this -- why? 'shy is that beyond the taxing power of the State?

MR. NILES: You have an instrumentality of commerce in the form of the vessels and these vessels operate on navigable waters. I want to get those predicates out there. Once those predicates are established as in this case, then it is the prerogative of congress to draw this legislation as it deems fit. Okay?

And I keep coming back to the notion, you know -- unfortunately, legislative history here is somewhat sparse. But Aloha Airlines teaches you don't need to go beyond the plain language of the statute if it is clear and free of ambiguity.

Now, can I come back one? I'm reminded, as I speak, that I haven't fully answered your question regarding the akuli situation.

The fact of the matter is we have wrestled with that question and we have decided in this case, because Mr. Hudson has a commercial fishing license -- I believe that's part of the record -- and he sells fish pursuant to that commercial fishing license. It's not -- the Division of Aquatic Resources requires the individual to hold the fishing license and sell.

Mr. Hudson does that, And he sells his catch and he pays excise tax on that transaction as well as income tax on his net profit.

So, you know, I certainly reflected on that question, whether or not -- and I basically concluded that that was not an issue that we should challenge in this case, that we should concede or at least not dispute -- concede is probably too forceful. But we would not dispute for the very reasons that you cite. And so Mr. Hudson, and certainly he sells fish that are caught aboard these boats and, similarly, as the record would indicate, if someone happens to have a good fortune of catching a fish that they wish to have mounted, that particular transaction, the mounting transaction, that's subject to excise tax. We have never questioned that

even though there's somewhat of a nexus or link to the vessel.

But instead, we take the plain language of the statute. And when we are talking about charter revenue, and that's the basis of the tax in this case, that's an inseparable part of the operation of the vessel itself on these navigable waters.

So as intellectually stimulating as your question is, we don't get there. And if we have learned anything from Aloha Airlines -- because, again, there the Hawai'i Supreme Court construed the statute and said, well, Congress really wasn't intending to do this. And the U.S. Supreme court said, well, yes, there may have been unintended consequences and we can't really tell why Congress did what it did, but CongressCongress acted. And under our system, when Congress acts within its authority and does so with clarity, I submit that your job is very easy at that point.

THE COURT: Okay. Mr. Elefante, you have been very patient.

MR. ELEFANTE: Your Honor, with respect to answering your first question about the tonnage clause and the commerce clause, the initial drafters of the Constitution -- I admit, I'm not a historian on the Constitution. But from the cases I have read, the reasons why the commerce clause was enacted and the tonnage clause was enacted was to promote free trade between the States.

There's another factor with the export/import clause of the Constitution that also comes into play. What the

drafters of the Constitution wanted was free play between the states and foreign countries. They had a fear that the states individually would start taxing -- like each state would start taxing this one company for all the business that they conducted between the states.

They wanted the business to come from foreign countries, come into their states, unload whatever they have, and leave. But that was only on the context of transporting goods between the states and foreign soil.

The commerce clause has slowly developed throughout time. And from the cases I read was that if a corporation is incorporated within the state, they are subject to all the state taxes. The Supreme Court recognized that states have the power to tax within their taxing jurisdiction. If a corporation is established in that particular state, the state can tax it.

I think I cited to some other cases where there was a case law that developed a home rule, a home situs for businesses, especially corporations that do business in more than one state. They always relied back onto that particular rule, that if a corporation has situs in one state, that particular state has the ability to tax not only the income, but any revenue that's generated within that state.

The commerce clause has slowly developed that particular idea saying, okay, if this particular vessel or corporation has situs in different states, the fear that they had -- the fear that Congress had or the drafters had was that the states, instead of just taxing their portion of it, they would be taxing the whale, I guess, income of the corporation.

For example, if a corporation has a hundred dollars worth of income, it has a home state in California, also it can establish situs in Washington State, what the -- what Congress and what the Supreme court has slowly drafted was, well, if they have dual entities or dual states that they do business in, the state can only tax that percentage or that amount that they have property in. So if that corporation has 70% of their business conducted in California and 30% is in Washington State, Washington State can tax 30% and then California can tax 70%.

The duty of tonnage is basically to allow -- it's to prevent the imposition of an additional tax when they come into court. Basically they are saying if you are going to come into two courts, basically, we are going to tax whatever basically at that time was tonnage because of the amount of the vessel was measured by tonnage at that point. They wanted to prevent that particular idea.

But in this case, we have a corporation who's in the State, that does only business in the State, has to come on to Hawaii property or Hawaii lands to conduct their business. There's no -- as far as the Constitution goes, nothing prevents the State from taxing that particular corporation, or in this particular case corporations.

The statute that Mr. Niles has presented, Section 5, if you read the statute, all it is, and what have argued, it's jut an addition of the commerce clause and tonnage clause issues that were presented in front of the Supreme Court. They haven't changed. They have recognized the home court rule, the commerce clause rules, with respect to that particular Section 5.

If you look at the legislative history, the only intent for that particular bill was the concern that ships that pass through waters next to a county were being taxed by the local community without even landing on their soil. The arguments -- I guess there was arguments saying they do have the problem with tax or don't have the problem with the tax. That would be the Constitutional problems that would have arised. This bill only clarifies it. Unless you have a status or situs in the Mate, you can't tax the vessel.

So, I mean, the State in this case can tax because the corporation is in the State, does business in the State. Congress has recognized that states have the ability to tax within their jurisdiction, as well as the Supreme Court has said if it's within our jurisdiction, we can tax despite the act that the taxpayers in this case go out more than three miles and come back. But the thing is they are not going anywhere. All they are doing is going out and coming back in the same state boundary, so to speak. So the State in this case can impose a general excise tax on the corporation. We are not imposing it on the vessel itself. We are not saying the vessel has to be charged a general excise tax every time it has to enter. What it is, the general excise tax is an imposition on the corporation that's incorporated in the State's income from whatever source they derive it from. So in that sense it's not even a duty of tonnage and it's not an imposition of a tax that prevents the corporation vessels from sailing out of port. So in that sense it doesn't offend the constitution nor does it impinge on Section 5.

The argument that Mr. Niles had made with respect to how clear Section 5 and what can be imposed or what

can be imposed, and he uses the Aloha Airlines example, if it was the intent of congress to eliminate the ability of a state to tax on the income, let's say in this case water transportation, it would have said it clearly as it did in the Aloha Airlines case. Basically that the statute in the case -- I think I put it in my reply brief -- basically says you couldn't -- the states could not tax the income derived from air transportation or gross receipts derived from it. So that language clear enough on its face that income tax or general excise tax is going to be imposed on it.

In this case all it says no tolls, no taxes, no operation of charges or other impositions on a vessel while the vessel is in transport or basically while it's moving over water. And if you look at that language and if you look at the legislative history, the only idea you get is if the vessel is passing through a -- passing through navigable waters, the State, unless it -- unless it's a corporation in the State, can't impose any type of taxes or tolls for the vessel to operate in that particular body of water.

THE COURT: Okay. Mr. Niles.

MR. NILES: very briefly.

For purposes of this motion, we are not challenging the ability of the Mate to tax corporations. We are not -- this case is not before you challenging the taxing power of the State.

Assuredly, the constitution, through the commerce clause as construed by the Supreme court and the tonnage clause and export/import clause, those provisions place outer limits on the State's taxing

power. And so long as a taxing measure falls within the ambit of those provisions as construed by the Supreme Court, the State doesn't have a problem, it can do what it's doing.

The difficulty for the State is that Congress, in exercising its power, has reduced or expanded the size of the net, depending on your metaphor. It has prohibited all taxes.

And in response to the comment that, well, Congress didn't use the word gross receipts or general excise, it didn't need to. The statute is very clear. It says no taxes or any other impositions whatsoever. So the idea is they wanted the net to be cast a broadly a Congress' authority could cast it. That's what happened here.

Now, they did create some exceptions. And it's our submission that it was the burden of the State of Hawaii to come forward and show that this particular revenue measure fell within one of the specific exceptions delineated by Congress, and they can't do that. That's the problem. That's why we keep coming back with the evidence that the amounts paid have nothing to do with the value of a service or facility that's available to the vessels. So they can't -- even though that's their burden, we, through our motion, negated that possibility. So it comes down to it doesn't matter whether or not as an abstract constitutional proposition, this was within the power the State. What it comes down to is whether or not the Congress has curtailed the exercise of that party, that right. And it's just very clear.

And yes, Aloha Airlines talked about an instance where the focus of the statute in Aloha Airlines was the taxation of passengers. Here we have the taxation of the instrumentality itself, and that's what's been prohibited. And it's simply not, you know, Gloucester Ferry long ago laid to rest the notion that you could tax the corporation as a way of evading the prohibition on the taxation of the instrumentality. They recognize there's no difference. And counsel, the Department, has not attempted to even argue to the contrary.

So it's not the taxing power that's before the Court. It is rather whether Congress has curtailed that power by prohibiting the taxation of vessels through whatever label the State might try to.

And so we think, Your Honor, you can see by the volume of the filings that the lawyers have really labored industriously in submitting this case to you. But it comes down to a simple proposition: Does this federal statute on its face prohibit the assessment of taxes under the undisputed facts of this case --these uses. And we submit that the only conclusion the statute allows is yes, these taxes are no longer assessable.

MR. ELEFANTE: Just one last point to argue with respect to the Gloucester case that Mr. Niles has pointed out to.

THE COURT: Can you spell that, please.

MR. ELEFANTE: It's spelled

G-L-O-U-C-E-S-T-E-R, Ferry Company. I think if you look on the reply for Mr. Niles, it's attached as Appendix A. That particular case recognized it was a commerce clause issue. That case also recognized that the home rule, the one I have explained to the Court with respect to the State's ability to impose a tax on the corporation that's within the State.

In this case, if the corporation is in the State, it's subject to the taxes in the State. I think the confusion here is we're equating vessels with corporations which is problematic because the general excise tax is only a tax on a corporation's business income in the State. It's not an imposition on a vessel when it sails. It's admitted that the taxpayer does business in the State, so, therefore, it's subject to the taxes in the State. And throughout time, I guess from the beginnings, the Supreme Court has recognized the State's ability to tax its own citizenry, it's imposition of all its citizens.

I don't think Congress wanted to go beyond their bounds with respect to eliminating the State's ability to tax their own citizens and corporations within the State. I think that's the 10th Amendment or 11th Amendment, right for the states to tax their own corporations.

I think throughout, Congress has to recognize that the State has its ability to, like I said, tax its own corporation within the State. And in this case, it's within the State and within the State's right to impose a general excise tax. I don't think Congress wanted to eliminate that factor.

If we use Mr. Niles' argument and extend it beyond the general excise tax, it conceivably, it might impose on the income tax. We might argue that they are not subject to the income tax based on this particular statute. I don't think Congress wanted to eliminate that particular idea, that the state could not impose income tax on a corporation within the state. Based on the reading, you could also argue that the passengers, if they are in the state, is not subject to the income tax or general excise tax if they are sailing on waters. It just opens up a whole new basically a slippery slope with respect to the arguments that the taxpayers are arguing in this case. If you stick with the idea that the State has the ability to control within its boundaries or within its jurisdictions and have the ability to tax its own citizens and corporations and the businesses that are conducted in the State, I think throughout time and throughout congress has recognized that particular principle.

So in this case the general excise tax is basically constitutional and within the States power to impose.

MR. NILES: Your Honor, if I may beg the indulgence of the court, I have to respond. We both cite Gloucester Ferry, and we cite it for different propositions.

One thing that the Supreme court has made very clear, and it did so in a case even last year, 2007, Congress has to be presumed to know what the law is. And the law at the time that the Marine Transportation Security Act was amended in 2002, the law, based on Gloucester Ferry, was a tax on the earnings of a vessel is no different than a tax on the vessel. So congress understood that by taxing the entity -- excuse me.

Congress understood by prohibiting the taxation of the vessel by any means, that it was prohibiting taxation indirectly through the owners of the vessel, the operators of the vessel.

And that's why I pose the rhetorical question at the end of my memo. How else would the State enforce a tax on a vessel except through taxation of its owners and operators? And they can't answer that question. And they need not answer the question because that issue was laid to rest a long time ago in Gloucester Ferry when the Supreme Court said you cannot tax dividends or the capital stock of an operator of a licensed and enrolled vessel because that is the same thing as taxing the vessel directly.

And so we -- you have to assume that Congress, in its wisdom, understood when it said no taxes on vessels, understood that that would reach the operator of the vessel. It just -- it is, I'm afraid, quite obvious from the wording.

So we stand on the language of the statute for the reasons that we have argued that provides a fully adequate basis for granting plaintiff summary judgment.

The recourse for the Department of Taxation, if they feel that this outcome is unjust, their recourse is to Congress, which is exactly what happened in the Aloha Airlines case. The State went back to Congress and the law was amended to allow a sales tax in the context of that case. But it is not for this Court, given the clear language of the statute, to take it upon itself to amend the statute through an interpretation that we would

submit would be contrary to the plain words used by Congress, which we argue should be respected. Thank you.

MR. ELEFANTE: Just one last point on the Gloucester case, Your Honor. The particular facts in that case was a corporation that was incorporated in New Jersey and the taxing entity in this case was basically, I think it was Philadelphia. So what I remarked earlier with respect to the commerce clause is whether or not the City of Philadelphia could tax this particular ferry company that's incorporated in New Jersey.

And like I said, the case clearly indicates that if New Jersey was in question, whether or not New Jersey could tax this particular ferry company, it would and it could tax that ferry company. If you go with Mr. Niles' argument that if Congress recognized this particular case, then you have to assume that they also recognize the fact that the home state where corporation is incorporated, where the boats are in their port, the state can tax the income not only from the business, but also the vessels, Your Honor.

But like I said, the imposition of the general excise tax is only on the corporation, it's not on the vessel itself. The vessel can sail in and out of the harbors. It does not have to pay the general excise tax to do that. It doesn't have to pay the general excise tax to operate its vessels. Like I said, the general excise tax is only an imposition on the income that is generated from the business that the corporation is conducted in the state, which State or which case law has indicated throughout history that the State can impose on the corporation.

So I think with respect to that historical background, the state has the ability to tax this entity, Your Honor.

THE COURT: Anything else, Mr. Niles?

MR. NILES: I will resist the temptation. I think we have belabored the argument and the Court can read the statute. And we have made -- presented the argument how it should be applied under the facts of these cases and we would ask that judgment be entered accordingly.

THE COURT: Okay. What a fascinating set of motions and a fascinating issue. This case really caused he Court to do some deep thinking about the commerce clause, the duty of tonnage and what was motivating the federal government to amend the -- I call it MTSA. I think you refer to that as the statute, Section 5. And the court is significantly persuaded that what Congress was focused on was the problem and the burden of this vessel on navigable waters as an instrumentality of interstate commerce being taken advantage of by the many parts it must pass through by the sovereigns of those many ports imposing a tax on the ability of the vessel to enter or leave the port without conducting any significant business, including -- not including loading and unloading. And I think what congress was persuaded to do was to attempt to prevent these taxing authorities in the many ports from simply taking the opportunity to levy a tax upon the vessel when the vessel has -- conducts no business other than entering, exiting and loading and unloading.

So there was some protection afforded to these vessels and its owners when Section 5 was amended in 2002.

We have a situation here where the vessels involved are not merely passing through Lahaina Harbor, but instead are essentially based in Lahaina Harbor and then conducting a commercial fishing or passenger transport business under the laws of the State of Hawai'i. So we have a situation where the taxpayer is no stranger to the State of Hawaii and its laws and, in fact, is engaging in ongoing regular and quite robust business, it seems to the Court. And that is what think the general excise tax is created to do, is to impose a tax upon this privilege of doing business.

Both counsel have pointed out that that is the purpose of the general excise tax. It is privilege tax.

And so when the Court looks at the history of the tonnage and commerce clause and Section 5 legislation, the Court believes the situation addressed in those pieces of legislation is distinguishable from the facts in this case. And to uphold the taxpayer's view would be to misapply either the duty of tonnage principle, the commerce clause principles or Section 5 principles.

Because we have a distinctly different situation in the cases at bar, the taxpayer was not simply entering, exiting or unloading in the Lahaina Harbor. It was transacting its business and Lahaina Harbor was the situs of picking up and dropping off their passengers and availing itself of the privilege of conducting its business in the harbor.

So, the Court is of the mind that the Section 5 and the duty of tonnage principles in this case would not prohibit the State from imposing general excise tax upon the revenues generated by the commercial

operations of the taxpayer.So for these and any other good cause shown in the record, the Court will respectfully grant the Director's motion and deny the taxpayer's motion. I think each one of them filed a motion.

Mr. Elefante, I don't think that the Court intends for the orders to recite findings of fact or conclusions of law. I merely tried to give the record some flavor of what the Court's thinking is, so that if this matter goes up on appeal, the appellate courts can try to understand what this Court was doing and why it did what it did.

So a simple order granting your client's motion and denying the taxpayer's motions, all separate orders, if you will. So four orders I'm asking you to prepare.

MR. ELEFANTE: Yes, Your Honor.

THE COURT: All right. Mr. Elefante, any further statement or record to be made at this time?

MR. ELEFANTE: No, Your Honor.

THE COURT: Mr. Niles, any further statement or record to be made?

Mr. NILES: Thank you. No, Your Honor.

THE COURT: Thank you very much.

(Proceedings concluded.)

Congressional Record: November 22, 2002
(Extensions)]
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CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002

speech of HON. DON YOUNG of Alaska in the house of representatives Thursday, November 14, 2002

Mr. YOUNG of Alaska. Mr. Speaker, I rise to speak about the Conference Report on S. 1214, which the House approved last week and is now ready for signature by the President. I would like to point out a particular concern that is addressed in Section 445 of the conference agreement. Section 445 addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking, in the case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution.

Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation.

Section 445 of the Conference Report addresses this problem by clarifying the sole circumstances when a local jurisdiction may impose a tax or fee on vessels. Local governments, and other non-Federal interests, may impose taxes or fees only under an existing exception under the Water Resources Development Act or under extremely limited circumstances in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel. The fees must also enhance the safety and efficiency of interstate and foreign commerce and represent at most a "small burden" on interstate and foreign commerce. Generally, taxes will not be allowed under this section. The sole exceptions are stated in Section 445.

Mr. President, I support Section 445 as an important correction of a silence in current law that should not be allowed to imperil legitimate commerce.

107TH CONGRESS
Report
HOUSE OF REPRESENTATIVES

2d Session

107-777

MARITIME TRANSPORTATION SECURITY ACT OF 2002

November 13, 2002- Ordered to be printed

Mr. YOUNG of Alaska, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1214]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1214), to amend the Merchant Marine Act, 1936, to establish a program to ensure greater security for United States seaports, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

***

TITLE IV--OMNIBUS MARITIME IMPROVEMENTS

SEC. 401. SHORT TITLE.

This title may be cited as the `Omnibus Maritime and Coast Guard Improvements Act of 2002'.

***

SEC. 445. PROHIBITION ON NAVIGATION FEES.

Section 4 of the Rivers and Harbors Appropriation Act of 1884 (33 U.S.C. 5) is amended as follows:

(1) The existing text is designated as subsection (a).

(2) The following is added at the end:

`(b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--

`(1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236); or

`(2) reasonable fees charged on a fair and equitable basis that--

`(A) are used solely to pay the cost of a service to the vessel or water craft;

`(B) enhance the safety and efficiency of interstate and foreign commerce; and

`(C) do not impose more than a small burden on interstate or foreign commerce.'.

108TH CONGRESS
Report
HOUSE OF REPRESENTATIVES

1st Session

108-334

--VISION 100--CENTURY OF AVIATION REAUTHORIZATION ACT

October 29, 2003- Ordered to be printed
Mr. YOUNG of Alaska, from the committee on conference, submitted the following
CONFERENCE REPORT

[To accompany H.R. 2115]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2115), to amend title 49, United States Code, to reauthorize programs for the Federal Aviation Administration, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

***

The legislation includes a section that amends section 4(b) of the Rivers and Harbors Appropriations Act of 1884 to clarify that the restriction in that section with respect to taxes on vessels or other water craft does not apply to property taxes on vessels or water craft, other than vessels or water craft that are primarily engaged in foreign commerce, so long as those taxes are constitutionally permissible under long-standing judicial interpretations of the Commerce Clause. To assure the consistent application of legal principles concerning non-Federal taxation of interstate transportation equipment, the amendment in this section is effective as of November 25, 2002. Over the years, the U.S. Supreme Court has ruled on the constitutionality of property taxes on various forms of interstate and international transportation equipment in a number of cases, including but not limited to *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891) (railroad rolling stock); *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) (barges on inland waterways); and *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U.S. 590 (1954) (domestic aircraft); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S.

274 (1977); and *Japan Line* v. *County of Los Angeles*, 441 U.S. 434 (1979). This line of decisions has sustained property taxes in interstate transportation cases when the tax is applied to an activity with a substantial nexus with the taxing entity, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the taxing entity. The exception for state and local taxes on vessels or watercraft that are primarily engaged in foreign commerce implements the holding of the Japan Line

case. The committee notes that section 4(b) does not affect whether sales or income taxes are applicable with respect to vessels. The purpose of section 4(b) was to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel, but also to prohibit fees and taxes imposed on a vessel simply because that vessel sails through a given jurisdiction.

Public Law 108–176
108th Congress
An Act
To amend title 49, United States Code, to reauthorize programs for the Federal Aviation Administration, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE; TABLE OF CONTENTS.
(a) SHORT TITLE.—This Act may be cited as the "Vision 100—
Century of Aviation Reauthorization Act".
(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

***

SEC. 829. NAVIGATION FEES.
(a) IN GENERAL.—Section 4(b) of the Rivers and Harbors Appropriation
Act of July 5, 1884 (33 U.S.C. 5(b); 116 Stat. 2133), is amended—
(1) by striking "or" at the end of paragraph (1);
(2) by striking the period at the end of paragraph (2) and inserting "; or"; and
(3) by adding at the end the following:
"(3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.".
(b) EFFECTIVE DATE.—The amendment made by subsection (a) is effective on and after November 25, 2002.

89-006

111TH CONGRESS

Rept. 111-303

HOUSE OF REPRESENTATIVES

1st Session

Part 1

--COAST GUARD AUTHORIZATION ACT OF 2010

OCTOBER 16, 2009- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. OBERSTAR, from the Committee on Transportation and Infrastructure, submitted the following

REPORT

[To accompany H.R. 3619]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 3619) to authorize appropriations for the Coast Guard for fiscal year 2010, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

(a) Short Title- This Act may be cited as the `Coast Guard Authorization Act of 2010'.

(b) Table of Contents- The table of contents for this Act is as follows:

***

TITLE III--SHIPPING AND NAVIGATION

Sec. 301. Goods and services.

Sec. 302. Seaward extension of anchorage grounds jurisdiction.
Sec. 303. Maritime Drug Law Enforcement Act amendment-simple possession.
Sec. 304. Technical amendments to tonnage measurement law.
Sec. 305. Adjustment of liability limits for natural gas deepwater ports.
Sec. 306. Period of limitations for claims against Oil Spill Liability Trust Fund.
Sec. 307. Merchant mariner document standards.
Sec. 308. Report on Coast Guard determinations.
Sec. 309. Ship emission reduction technology demonstration project.
Sec. 310. Phaseout of vessels supporting oil and gas development.
Sec. 311. Arctic marine shipping assessment implementation.
Sec. 312. Supplemental positioning system.
Sec. 313. Dual escort vessels for double hulled tankers in Prince William Sound, Alaska.

***

TITLE III--SHIPPING AND NAVIGATION

SEC. 301. GOODS AND SERVICES.

Section 4(b) of the Act of July 5, 1884, commonly known as the Rivers and Harbors Appropriation Act of 1884 (33 U.S.C. 5(b)), is amended--

(1) by striking `or' at the end of paragraph (2)(C);

(2) by striking the period at the end of paragraph (3) and inserting `; or'; and

(3) by adding at the end the following:

`(4) sales taxes on goods and services provided to or by vessels or watercraft

(other than vessels or watercraft primarily engaged in foreign commerce).'.

***

TITLE III--SHIPPING AND NAVIGATION

Title III amends statutes relating to shipping and navigation in U.S. waters.

Sec. 301. Goods and Services

Section 301 clarifies that non-Federal sales taxes on goods and services may be levied upon, or collected from, vessels when the vessel is operating on any navigable water subject to the authority of the United States.

HR 3619 EAS

In the Senate of the United States,
May 7, 2010.

Resolved, That the bill from the House of Representatives (H.R. 3619) entitled `An Act to authorize appropriations for the Coast Guard for fiscal year 2010, and for other purposes.', do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the `Coast Guard Authorization Act for Fiscal Years 2010 and 2011'.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
***
TITLE VI--SHIPPING AND NAVIGATION
Sec. 601. Technical amendments to chapter 313 of title 46, United States Code.
Sec. 602. Clarification of rulemaking authority.

Sec. 603. Icebreakers.
Sec. 604. Phaseout of vessels supporting oil and gas development.